No. 92-1168

In the Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS, PETITIONER

v.

FORKLIFT SYSTEMS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a plaintiff who seeks relief under Title VII of the Civil Rights Act of 1964 from hostile environment sexual harassment must show that the harassment has "psychological" effects.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Attorney General and the Equal Employment Opportunity Commission (EEOC) share important responsibilities for enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits, inter alia, discrimination in terms and conditions of employment. The EEOC has also issued regulations and policy statements that provide interpretive guidance in applying Title VII to claims of hostile environment sexual harassment. See 29 C.F.R. 1604.11(a); *see also EEOC: Policy Guidance on Sexual Harassment*, 8 F.E.P. Manual (BNA) 405:6681 (issued Mar. 19, 1990).

STATEMENT

Petitioner challenges a decision of the United States Court of Appeals for the Sixth Circuit, which affirmed a dismissal of her Title VII sexual harassment suit. See Pet. App. A1-A3. She alleges that her employer, respondent Forklift Systems, Inc., maintained a hostile work environment that led to her constructive discharge, and she seeks injunctive relief and backpay. The United States District Court for the Middle District of Tennessee adopted a magistrate's report recommending that petitioner's suit be dismissed. *Id.* at A4-A5. The magistrate concluded that petitioner was not entitled to Title VII relief under the controlling Sixth Circuit precedent, because the employer's conduct was not "so severe as to be expected to seriously affect the plaintiff's psychological well-being." *Id.* at A33-A34.[1]

1. The magistrate's report contains findings of fact with respect to petitioner's hostile environment claim. Pet. App. A7-A21. As the magistrate explained, Forklift Systems is a Tennessee corporation that sells, leases, and repairs forklift trucks. *Id.* at A8. The President of Forklift Systems, Charles Hardy, supervises six managers: the Office Manager; the Sales Manager; the Rental Manager; the Service Manager; the Parts Manager; and the Comptroller. *Id.* at A8-A9. Petitioner was the Rental Manager from April 22, 1985, to October 1, 1987. During that period, petitioner and the Office Manager (Hardy's daughter) were the only female managers. *Ibid.* Hardy also had a business relationship with petitioner's husband, Larry Harris. Hardy had loaned money to Harris to finance a company, Cellular Power, that supplied Forklift Systems with batteries. *Id.* at A20-A21.

[1] Petitioner also contended that she was subject to discriminatory treatment in compensation and travel allowances. The magistrate resolved those allegations in Forklift's favor, finding that the "discrepancies [were] attributable to factors other than sex discrimination." Pet. App. A10. Those claims are not at issue here.

While employed at Forklift Systems, petitioner "was the object of a continuing pattern of sex-based derogatory conduct from Hardy." Pet. App. A13. For example, Hardy repeatedly made denigrating remarks to Harris, in the presence of other Forklift Systems employees, such as "You're a woman, what do you know," "You're a dumb ass woman," and "We need a man as the rental manager." *Ibid.* Hardy also joked to petitioner, again in front of Forklift Systems employees and a Forklift Systems supplier, by saying, "Let's go to the Holiday Inn to negotiate your raise." *Id.* at A14.[2] Hardy asked petitioner and other female employees to retrieve coins from his front pants pocket and to pick up objects that he would throw on the floor in front of them, but did not make those requests of male employees. *Id.* at A14-A15. Hardy remarked "with sexual innuendos" about the attire of petitioner and other female employees. *Id.* at A15. Hardy also indulged in a "running joke that large breasted women are that way because they eat a lot of corn." *Id.* at A32.[3]

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[2] The magistrate evaluated that comment "in [the] context of the fact that the company often conducted management meetings at a nearby Holiday Inn," stating that petitioner "knew this [comment] was meant as a joke, and treated it as a joke at the time." Pet. App. A14. The magistrate concluded that the comment "show[ed] Hardy to be a man with a bad sense of humor, but it was not a sexual proposition." *Id.* at A32.

[3] Petitioner presented evidence of other sexually offensive conduct that was not specifically mentioned among the magistrate's illustrative examples. For example, petitioner testified that "on more than one occasion," Hardy had suggested, in front of others, that the two commence a sexual relationship. Tr. 20. Petitioner recalled Hardy saying, "Oh, by the way, Teresa, don't you think it is about time we started screwing around? You and Larry have been married over a year now." *Ibid.* According to petitioner, Hardy commented on her anatomy, referring to her buttocks as "a racehorse ass." Tr. 24. She testified that after Hardy and his wife returned from a vacation in Florida, Hardy described the bikinis worn on the beach and stated to petitioner, "Of course you couldn't wear one like that because your ass is so big, if you did there would be

Petitioner met with Hardy on August 18, 1987, "to complain about his treatment [of] her" and threatened to resign. Pet. App. A15-A16. During the meeting, Hardy "admitted making some of the comments, but said they were 'jokes.'" *Id.* at A16. Hardy claimed that he was previously unaware that petitioner "was offended by any of his conduct," and "apologized and promised that his offensive behavior would cease." *Ibid.* Based on Hardy's assurances, petitioner decided not to resign. *Ibid.* "Shortly after the August 18th meeting," Hardy resumed his "offensive behavior" by "suggesting that [petitioner] promised sexual favors to a customer in order to secure an account." *Id.* at A16-A17. Hardy asked petitioner, in front of other Forklift Systems employees, "What did you do, promise the guy at ASI (Alladin Synergetics, Inc.) some 'bugger' Saturday night?" *Id.* at A17.

On October 1, 1987, petitioner collected her paycheck and left her job at Forklift Systems. She met with an attorney the following day and filed a complaint with the EEOC on Monday, October 5, 1987. Pet. App. A17. After petitioner filed her EEOC complaint, Hardy altered his desk calendar and petitioner's personnel file, and "made some notes in order to manufacture a justification for her termination." *Id.* at A19.[4] On October 7, 1987, a few days after petitioner quit her job at Forklift Systems

an eclipse and nobody could get any sun." Tr. 25. Dixie Shadrake, a former clerical employee of Forklift, testified that Hardy would suggest turning down the air conditioning when a female employee wore a tight shirt because of the effect of the lower temperature on the woman's breasts. Tr. 76.

[4] The back-dated notes indicated that "Hardy was considering terminating [petitioner] because she could not get along with the receptionist." Pet. App. A19-A20. Former receptionists testified, however, that "they had no real problems with [petitioner]," and the magistrate found "no credible proof that Hardy was ever dissatisfied with [petitioner's] job performance or ever intended to fire her." *Id.* at A20. Rather, the magistrate found that petitioner "was good at her job, and did not receive any substantial criticism from Hardy." *Id.* at A19.

and filed a charge with the EEOC, Forklift Systems cancelled its account with Cellular Power. *Id.* at A20.[5]

2. After reciting the foregoing factual findings, the magistrate evaluated whether they entitled petitioner to relief. At the outset, the magistrate "discounted" the employer's argument that petitioner's Title VII suit was pretextual and that she quit her job because of the deteriorating business relationship between Hardy and her husband. Pet. App. A21-A24. The magistrate stated that the evidence showed that "Hardy is a vulgar man and demeans the female employees at his work place." *Id.* at A24. He observed that "[m]any clerical employees" at Forklift Systems "tolerate [Hardy's] behavior and, in fact, view it as the norm and as joking," but the failure of those employees to take offense did not mean that petitioner, a manager, shared that view. *Id.* at A24-A25. Indeed, petitioner felt that "Hardy's sexual comments undermined her authority," which "was especially painful when Hardy would make demeaning sexual comments to [petitioner] in front of her coworkers." *Id.* at A25.

The magistrate nevertheless concluded that petitioner had failed "to prove that Hardy's conduct was so severe as to create a hostile work environment." Pet. App. A26. The magistrate stated:

> In the Sixth Circuit, the test for whether or not sexual harassment rises to the level of a hostile work environment is whether the harassment is "conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances." * * * Once the objective "reasonable person" test is met, the court must next determine if the victim was subjectively

[5] Hardy's secretary informed Larry Harris of the cancellation by telephone and confirmed it in a letter dated October 7, 1987. Pet. App. A20-A21. After Cellular's account was cancelled, Larry Harris stopped repaying Hardy's loan and Hardy sued Harris on the note in state court. *Id.* at A20.

> offended and suffered an injury from the hostile work environment.

Id. at A28-A29, quoting *Rabidue* v. *Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). Although the magistrate considered this "a close case," he concluded that many of "Charles Hardy's comments cannot be characterized as much more than annoying and insensitive." Pet. App. A31.

The magistrate stated that "[m]ost of Hardy's wisecracks about females' clothes and anatomy were merely inane and adolescent, such as the running joke that large breasted women are that way because they eat a lot of corn." Pet. App. A31-A32. The magistrate similarly characterized "Hardy's coin dropping and coin-in-the-pocket tricks." *Id.* at A32. The magistrate noted that the other female employees at Forklift Systems "considered Hardy a joker" and were not offended by Hardy's vulgar sexual comments, but that petitioner "was more sensitive" to Hardy's behavior than the "clerical employees, who it appears were conditioned to accept denigrating treatment." *Id.* at A31-A32.[6]

The magistrate viewed as "more objectionable" Hardy's comments that petitioner was a "dumb ass woman" and "you're a woman, what do you know." Pet. App. A33. The magistrate found "truly gross and offensive" Hardy's remark suggesting that petitioner "promised sexual favors to a customer in order to secure an account," but noted that the remark was not made in front of a client, but in

[6] According to the testimony of several former Forklift Systems clerical employees, "Hardy's frequent jokes and sexual comments were just part of the joking work environment at Forklift." Pet. App. A18. Those employees were not offended by Hardy's behavior and were unaware that petitioner was offended. *Ibid.* The magistrate specifically pointed to the testimony of a former receptionist who "aptly expressed her feelings about comments Hardy may have made about her body" when she "jauntily testified, 'lots of people make comments about my breasts.'" *Ibid.*

front of other Forklift Systems employees. *Ibid.* The magistrate believed that "some of Hardy's inappropriate sexual comments, especially this last one, offended [petitioner], and would offend the reasonable woman." *Ibid.* The offensive comments, however, were not

> so severe as to be expected to seriously affect [petitioner's] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

Id. at A34. The magistrate also concluded that petitioner was not "subjectively so offended that she suffered injury, despite her testimony to the contrary." *Ibid.*[7]

Turning to petitioner's claim of constructive discharge, the magistrate was "moved" by the fact that after petitioner informed Hardy "that his sexual comments were not jokes to her, Hardy did not stop altogether," but made his "crude" remark about promising sex to a client. Pet. App. A39. The magistrate concluded, however, that "since things were just annoying and not that bad before," Hardy's further offensive comment did not make it foreseeable that petitioner would resign. *Id.* at A39-A40. While that comment might have prompted petitioner to speak again to Hardy "or reprimand him sharply at the time of the comment," the magistrate found, "[i]t would not drive a reasonable person, even a reasonable female

[7] In support of that conclusion, the magistrate cited petitioner's testimony that she had loved her job at Forklift Systems, that she and her husband had socialized with Hardy and his wife, and that she "often drank beer and socialized with Hardy and her coworkers." Pet. App. A34-A35. The magistrate also observed that although "[t]he channels of communication were open" between petitioner and Hardy, she waited two years before complaining of his offensive conduct. *Id.* at A35. Thus, "[a]lthough Hardy may at times have genuinely offended [petitioner]," the magistrate did not "believe that he created a working environment so poisoned as to be intimidating or abusive to [her]." *Ibid.*

manager, to quit." *Id.* at A40. Having concluded that Harris had failed to establish a sexually hostile work environment or constructive discharge in violation of Title VII, the magistrate recommended that her complaint be dismissed. *Id.* at A45.

3. The district court adopted the magistrate's report, finding petitioner's objections to be "without merit," and dismissed the case. Pet. App. A4-A5. The court of appeals affirmed in an unpublished per curiam opinion, relying "upon the reasoning found in the report and recommendation of the magistrate judge." Pet. App. A1-A3.

SUMMARY OF ARGUMENT

This Court has held that Title VII of the Civil Rights Act of 1964 provides relief from sexual harassment in the workplace if the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986). The EEOC's regulations and policy statements explain that "hostile environment" sexual harassment is actionable if the harassment would interfere with the job performance of a reasonable person who is subjected to that conduct. The court of appeals erred in holding that a plaintiff who seeks equitable relief under Title VII must additionally show that the harassment has "psychological" effects.

Title VII does not expressly require a plaintiff to demonstrate "psychological" injury. The Sixth, Seventh, and Eleventh Circuits have adopted a "psychological effects" requirement by mistakenly adopting inapposite language from other lower court decisions. The language that has been converted into a "psychological effects" test was first used not to establish a standard for hostile environment discrimination, but to describe some of its consequences. As the Ninth Circuit has explained, that extratextual requirement for Title VII relief serves no useful

purpose and misdirects the Title VII inquiry. The issue under Title VII is whether the employer has maintained a discriminatory working environment, not whether the employer has inflicted emotional distress. The standard that we urge—whether the objectionable conduct would affect a reasonable victim's performance of the job—properly focuses the inquiry on the equal employment opportunity concerns that are central to Title VII.

ARGUMENT

A PLAINTIFF MAY OBTAIN RELIEF UNDER TITLE VII FROM HOSTILE ENVIRONMENT SEXUAL HARASSMENT WITHOUT PROVING THAT THE HARASSMENT WOULD HAVE ADVERSE PSYCHOLOGICAL EFFECTS

A. An Employee Establishes Hostile Environment Sexual Harassment By Showing That The Objectionable Workplace Conduct Is Sufficiently Severe Or Pervasive To Interfere With The Job Performance Of A Reasonable Person Who Is Subjected To That Conduct

Title VII of the Civil Rights Act of 1964 states that it shall be an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2 (a)(1). This Court determined in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), that an employee may obtain injunctive relief and backpay under Title VII for "hostile environment" sexual harassment. The question in this case is what constitutes an adequate showing of that type of harassment for purposes of Title VII. We submit that a plaintiff may seek relief from hostile environment sexual harassment if the objectionable conduct is sufficiently severe or pervasive to create discrimination in the terms and conditions of employment. Objectionable conduct is sufficiently severe or pervasive

if it would interfere with a reasonable person's ability to perform the job.

1. This Court recognized in *Meritor Savings Bank, FSB* v. *Vinson, supra,* that "[w]ithout question, when a supervisor harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." 477 U.S. at 64. It additionally recognized that harassment of that sort can amount to discrimination with respect to "compensation, terms, conditions, or privileges of employment." *Ibid.* The Court explained that "Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent '"to strike at the entire spectrum of disparate treatment of men and women"' in employment." *Vinson,* 477 U.S. at 64, quoting *City of Los Angeles Dep't of Water & Power* v. *Manhart,* 435 U.S. 702, 707 n.13 (1978), and *Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

The Court agreed with the Fifth Circuit's conclusion in *Rogers* v. *EEOC,* 454 F.2d 234 (1971), cert. denied, 406 U.S. 957 (1972), a racial discrimination case, that

> [t]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. * * * One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Vinson, 477 U.S. at 66, quoting *Rogers,* 454 F.2d at 238. The Court explained that "[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited." *Vinson,* 477 U.S. at 66. The Court quoted approvingly the Eleventh Circuit's observation in *Henson* v. *Dundee,* 682 F.2d 897 (1982):

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Vinson, 477 U.S. at 67, quoting *Henson,* 682 F.2d at 902.

The Court noted, however, "as the courts in both *Rogers* and *Henson* recognized," that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Vinson,* 477 U.S. at 67. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Ibid.,* quoting *Henson,* 682 F.2d at 904.

2. The Court's decision in *Vinson* relied heavily on the EEOC Guidelines "specifying that 'sexual harassment', as there defined, is a form of sex discrimination prohibited by Title VII." 477 U.S. at 65. The Court noted that those Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Ibid.,* quoting *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141-142 (1976), and *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

The EEOC Guidelines that the Court cited remain in force and state in relevant part:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly

> or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. 1604.11(a). The EEOC Guidelines additionally state:

> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. 1604.11(b).

Following the Court's decision in *Vinson*, the EEOC issued additional policy guidance concerning Title VII's prohibition on sexual harassment. See *EEOC: Policy Guidance on Sexual Harassment*, 8 F.E.P. Manual (BNA) 405:6681 (issued Mar. 19, 1990) [hereinafter *EEOC Guidance*]. The EEOC's policy guidance, which was issued to EEOC field office personnel for use in enforcing Title VII, discussed a number of topics, including what conduct would have the effect of "creating an intimidating, hostile, or offensive working environment" (29 C.F.R. 1604.11(a)). *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6689.

As the EEOC's policy guidance explains, a "hostile environment" exists if the employer engages in a pattern of objectionable conduct that would interfere with the job performance of a reasonable person who is subjected to that conduct. The EEOC stated at the outset:

> In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." * * * Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

EEOC Guidance, 8 F.E.P. Manual (BNA) at 405:6689. However, the EEOC also explained:

> The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.

Id. at 405:6690.[8]

The EEOC stated that "[a] 'hostile environment' claim generally requires a showing of a pattern of offensive conduct," although "a single, unusually severe incident of

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[8] The so-called "reasonable victim" standard comports with the statutory focus of Title VII on the effects, rather than the motivation, of discriminatory practices. See *Rogers*, 454 F.2d at 238-239 ("the absence of discriminatory intent by an employer does not redeem an otherwise unlawful employment practice"; "the thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment practice and not at the employer's motivation"), citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422-423 (1975) ("[A] worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.'") (emphasis supplied by Court).

harassment may be sufficient to constitute a Title VII violation," especially "when the harassment is physical." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690 to 405:6691. "When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks." *Id.* at 405:6691. The EEOC also stated:

> Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or pervasive" and directed at employees because of their sex.
>
> Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment.

Id. at 405:6692 (citations omitted). Finally, the EEOC stated that an employer is liable for constructive discharge "when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation." *Id.* at 405:6693.

B. An Employee Is Not Required To Show That The Objectionable Workplace Conduct Has Psychological Effects

The Court's decision in *Vinson* and the EEOC's policy guidance are entirely consistent in defining when an employee may seek equitable relief under Title VII for hostile environment sexual harassment. Sexual harassment is actionable if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment

and create an abusive working environment,'" *Vinson*, 477 U.S. at 67. That standard is satisfied if the harassment would interfere with a reasonable victim's job performance, regardless of whether the conduct is directed at an individual victim or at a protected class of victims. See 29 C.F.R. 1604.11(a)(3); see generally *EEOC Guidance, supra*. There is no need for a victimized employee to demonstrate, in addition, that the objectionable conduct would "affect seriously the psychological well-being of that reasonable person under like circumstances" or that the employee actually suffered psychological injury. Pet. App. A28-A29. That requirement is inconsistent with Title VII's function of ensuring equal employment opportunity.[9]

1. The Sixth Circuit's requirement that a plaintiff alleging hostile environment sexual harassment must demonstrate "psychological" effects has its origin in the Eleventh Circuit's decision in *Henson* v. *Dundee, supra*, which in turn relied on the Fifth Circuit's decision in *Rogers* v. *EEOC, supra*. The *Rogers* decision, which this Court cited in *Vinson*, involved racial discrimination. The plaintiff, a Spanish surnamed employee of an optometric practice, filed a complaint with the EEOC alleging that her employer segregated patients by race. 454 F.2d at 236. The EEOC sought access to the employer's

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[9] The courts of appeals have divided on the question. The Ninth Circuit has refused to require that a Title VII plaintiff must demonstrate "psychological" effects to obtain equitable relief for hostile environment sexual harassment. See *Ellison* v. *Brady*, 924 F.2d 872, 878 (1991). The Third and Eighth Circuits have not expressly addressed the question, but they have not required such a showing. See *Andrews* v. *City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Burns* v. *McGregor Electronic Indus., Inc.*, 955 F.2d 559 (8th Cir. 1992). The Sixth, Seventh, and Eleventh Circuits, however, have suggested that a plaintiff must show "psychological" effects. *Rabidue* v. *Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 418-420 (7th Cir. 1989); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987).

patient applications, and the employer questioned whether the allegations would constitute an unlawful employment practice subject to the EEOC's investigative authority. *Id.* at 237. The Fifth Circuit concluded that a segregative practice could be "so offensive to [the employee's] sensibilities" that it would constitute an unlawful employment practice in violation of Title VII. *Ibid.*

The Fifth Circuit reasoned that Title VII's broadly worded prohibition on discrimination in "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1), "sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." 454 F.2d at 238. The court observed that it could "readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Ibid.* The Fifth Circuit's reference to "psychological" effects simply described the possible consequences of a hostile work environment; it was not meant to set forth a restrictive test for determining whether a hostile environment exists. See *Ellison* v. *Brady*, 924 F.2d 872, 878 n.8 (9th Cir. 1991).

Nevertheless, the Eleventh Circuit used the descriptive language from *Rogers* to establish the standard for proving a Title VII hostile environment sexual harassment claim. See *Henson* v. *Dundee*, 682 F.2d at 904. The Eleventh Circuit correctly observed that not every discriminatory slight affects employment conditions "to a sufficiently significant degree to violate Title VII." *Ibid.*, citing *Rogers*, 454 F.2d at 238. But the court went astray in formulating a standard to distinguish between actionable and non-actionable harassment. The Eleventh Circuit mistakenly relied on *Rogers*' descriptive reference to "psychological" effects and stated that the relevant inquiry was "[w]hether sexual harassment at the workplace is sufficiently severe and persistent to affect

seriously the psychological well being of employees." *Ibid.*

The Sixth Circuit has adopted the *Henson* formula, but with the added proviso that the plaintiff must satisfy both an objective "reasonable person" test and a subjective "actual offense" test. As the magistrate explained, the Sixth Circuit's test inquires whether the objectionable conduct is

> "conduct which would interfere with that hypothetical reasonable individual's work performance *and affect seriously the psychological well-being of that reasonable person under like circumstances.*"

Id. at A28-A29, emphasis added, quoting *Rabidue* v. *Osceola Refining Co.*, 805 F.2d at 620. Once the employee has met that test, "the particular plaintiff would nevertheless also be required to demonstrate that she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment." 805 F.2d at 620. Although the Sixth Circuit stated that it had "considered the EEOC guidelines" and "canvassed existing legal precedent," it cited no direct authority for its approach. *Id.* at 619. The Seventh Circuit has followed the Sixth Circuit's approach. *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 418-420 (1989). See also *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987) (applying the *Henson* test).

2. The Sixth, Seventh, and Eleventh Circuits are mistaken in requiring a Title VII plaintiff to show "psychological" effects to prove hostile environment sexual harassment. By its terms, Title VII requires no inquiry into the "psychological well-being" of employees. As the Court noted in *Vinson*, Title VII prohibits discrimination with respect to "terms, conditions, or privileges of employment." See 477 U.S. at 65-67. Hostile environment sexual harassment is actionable under Title VII precisely because, and only to the extent that, it substantially af-

fects those terms, conditions, or privileges. *Id.* at 67. To be sure, sexual harassment—particularly harassment that is offensive, humiliating, or degrading—may have emotional consequences and can even injure an employee's "psychological well-being." But those emotional and psychological effects are not the *sine qua non* of a Title VII claim. Rather, sexual harassment violates Title VII if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Vinson*, 477 U.S. at 67.

As this Court recognized in *Vinson*, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." 477 U.S. at 67. The Sixth, Seventh, and Eleventh Circuits adopted their "psychological effects" tests to distinguish instances of nonactionable sexual conduct, such as the isolated utterance of an epithet that offends an employee but "would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Ibid.* Courts, however, should make those distinctions by directly inquiring whether the plaintiff has been denied equal employment opportunity.

The issue in a Title VII case is whether the employer has maintained a discriminatory working environment, not whether the employer has inflicted emotional distress. See *King* v. *Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (conduct may be actionable if it "den[ies] the plaintiff the right to participate in the work place on [an] equal footing with others similarly situated") (internal quotation marks omitted). A court can evaluate whether sexual harassment substantially affects the work environment without conducting an inquiry into "psychological effects," which do not in any event have controlling significance. As the Ninth Circuit has pointed out:

> Conduct can unreasonably interfere with work performance without causing debilitation and without seriously affecting an employee's psychological well-being.

Ellison v. *Brady*, 924 F.2d 872, 878 n.8 (1991).

The standard that we have articulated—whether the objectionable conduct would interfere with a reasonable victim's job performance, pp. 9-14, *supra*—properly focuses the inquiry on the equal employment opportunity concerns that are central to Title VII. There is no need to conduct an additional and ultimately intractable inquiry into objective or subjective psychological effects. Under the common sense principle of Occam's razor, the legal standard should not be made more complicated than is necessary to implement the statute.

Significantly, the courts of appeals have found no need to evaluate specific "psychological" effects in resolving other types of Title VII hostile environment claims. For example, the Sixth Circuit has stated that to prove hostile environment racial harassment, "[t]he employee need only show that the harassment made it more difficult to do the job." *Davis* v. *Monsanto Chemical Co.*, 858 F.2d 345, 349 (1988), cert. denied, 490 U.S. 1110 (1989). The court held that *Rabidue*'s "psychological effects" standard applied only to sexual harassment claims and that an earlier case, *Erebia* v. *Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986), "remains the controlling law for racially hostile work environment claims in this circuit." *Davis*, 858 F.2d at 348 (footnote omitted).[10]

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[10] In *Erebia*, the court held that evidence of ethnic slurs and insubordination directed at a Mexican American supervisor by his subordinates was sufficient to support a finding of hostile work environment in violation of Title VII and 42 U.S.C. 1981. See *Erebia*, 772 F.2d at 1256. The plaintiff in *Erebia* testified that employees under his supervision called him a "wet bag [*sic*], tomato picker," told him to "go back to Mexico, there was some white person that could be doing my job instead of a Mexican," and refused to follow his instructions because "I was a Mexican and he was white." *Id.* at 1252. When Erebia complained to the

The "psychological effects" requirement is not only unnecessary, but it also misdirects the inquiry in a way that undermines Title VII's prohibitions on discrimination in employment. As the Ninth Circuit explained in *Ellison* v. *Brady, supra*:

> Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation. *Accord* [*EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405.6690 n.20]. Although an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.

924 F.2d at 878. Specifically, an employee suffers unlawful discrimination in employment—and is therefore entitled to equitable relief under Title VII—if the employee can demonstrate objectionable sex-based conduct that is sufficiently severe or pervasive to interfere with a reasonable person's job performance vis-à-vis other employees who are not subjected to the offensive conduct.

As the Ninth Circuit recognized, the problem with the "psychological effects" test is not merely theoretical. See *Ellison*, 924 F.2d at 877-878. That test has resulted in dismissal of Title VII suits alleging conduct that might otherwise support a hostile environment sexual harassment claim. For example, the Sixth Circuit employed that test in *Rabidue* v. *Osceola Refining Co., supra,* to reject the hostile environment claim of a female employee who faced daily exposure in common work areas to posters of nude or scantily dressed women and who complained of a co-worker who routinely referred to women as "whores," "cunt," "pussy," and "tits." See 805 F.2d

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personnel manager, he was called a "hot headed Mexican" and was told to ignore the offensive remarks. *Ibid.*

at 615 (majority opinion); *id.* at 623-624 (Keith, J., dissenting in part).[11]

The Sixth Circuit held that the co-worker's "obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees." 805 F.2d at 622. In that court's view, the plaintiff's right to relief must be "considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica" in the media and "in other public places." *Ibid.* The EEOC has specifically criticized that decision. See *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690 & n.20.[12]

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[11] The offending employee, who occupied a supervisory position, also directed vulgar remarks toward the plaintiff, calling her "fat ass" and suggesting that "[a]ll that bitch needs is a good lay." 805 F.2d at 623-624. Management was unresponsive to the complaints of the plaintiff and other female workers that the posters were offensive and that the employee's vulgarities "greatly disturbed" them. *Id.* at 624.

[12] The Eleventh Circuit has attempted to mitigate the effect of the "psychological effects" test by applying that test less stringently than it has been applied in the Sixth Circuit. For example, the Eleventh Circuit stated in *Walker* v. *Ford Motor Co.*, 684 F.2d 1355 (1982), a racial discrimination case, that the "repeated," "continuous," and "prolonged" use of "racially abusive language," such as calling poorly repaired cars "nigger-rigged" and referring to the car salesman with the lowest sales volume as "the black ass," was sufficient to establish a hostile work environment. *Id.* at 1358-1359. The trial court's finding that the offensive comments made the African American plaintiff "feel unwanted and uncomfortable in his surroundings" satisfied the "psychological effects" standard that the Eleventh Circuit adopted in *Henson*. *Id.* at 1359. The sexually demeaning statements that were allegedly made in *Rabidue*, however, are no less offensive than the racially demeaning statements in *Walker*. The different results in those cases suggest that a "psychological effects" standard would not produce more consistent or rational results than looking solely to whether the objectionable conduct would interfere with a reasonable employee's job performance.

The vice of the "psychological effects" test is that it withholds Title VII relief from victims of sex-based conduct that profoundly affects the conditions of the victim's employment, as long as the conduct is not found to be psychologically debilitating. Under the subjective element of the test, an employee who is emotionally capable of withstanding sexually offensive conduct would be required to tolerate patently discriminatory behavior unless and until the employee actually suffered psychological trauma. Title VII, which has as its goal equal employment opportunity, should not be construed to require that unduly high threshold showing for obtaining relief from discrimination.[13]

C. The Court Of Appeals' Judgment Should Be Vacated And The Case Should Be Remanded For Reconsideration Under The Proper Standard

The court of appeals and the district court both endorsed the magistrate's use of the "psychological effects" test to dismiss petitioner's hostile environment sexual harassment claim. Because the decision in this case rests on application of an incorrect legal standard, the decision should be vacated and the case remanded for reconsideration in light of the correct standard. Cf. *United States* v. *Fordice*, 112 S. Ct. 2727 (1992).

1. Forklift Systems is directly accountable for the discriminatory conduct of its president, Charles Hardy. Pet. App. A30-A31. The magistrate found that Hardy "demeans the female employees at his work place," *id.*

[13] Although evidence of psychological harm or emotional distress is not necessary to establish a Title VII claim for equitable relief, a plaintiff could conceivably use it as evidence that the offensive conduct would interfere with the job performance of a reasonable person. Additionally, the evidence may be relevant in an action to recover damages for emotional injury under the Civil Rights Act of 1991, which allows recovery of compensatory and punitive damages for intentional discrimination in violation of Title VII. See 42 U.S.C. 1981a(b) (Supp. III 1991). Petitioner's suit in this case, however, seeks only equitable relief.

at A24, and that Hardy's conduct "would offend the reasonable woman," *id.* at A33. The workplace conduct that concededly occurred in this case could result in hostile environment sexual harassment, provided that the conduct was sufficiently pervasive in the workplace. For example, the EEOC has specifically identified sex-based derogation, which is reflected in Hardy's statements that "You're a woman, what do you know," "You're a dumb ass woman," and "We need a man as the rental manager," *id.* at A13, A33, as conduct that may give rise to Title VII liability if "it is 'sufficiently patterned or pervasive.' " *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6692, citing *Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987).

Hardy's sexually suggestive conduct may also provide a potential basis for Title VII liability. The magistrate characterized "Hardy's wisecracks about females' clothes and anatomy" and Hardy's "coin dropping and coin-in-the-pocket tricks" as "merely inane and adolescent." Pet. App. A32. But the fact that Forklift Systems' president is crude, is immature, and has "a bad sense of humor," *ibid.*, does not insulate the company from Title VII's prohibition of hostile environment sexual harassment. Sexually offensive conduct that selectively demeans and humiliates women in the workplace can impair a reasonable female employee's job performance, even if other people consider the conduct as "harmless or insignificant." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690.

The magistrate discounted the significance of Hardy's sexually oriented conduct, stating that "the degree of sexual hostility that existed in [petitioner's] work environment was comparable to that in *Rabidue*." Pet. App. A37. As we have explained, however, the Sixth Circuit's decision in *Rabidue* is a dubious benchmark for measuring a nondiscriminatory work environment. See pp. 20-21, *supra*. The *Rabidue* court concluded that demeaning sexual conduct may be justified based upon "the lexicon of obscenity that pervaded the environment of the work-

place both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment." 805 F.2d at 620. The EEOC has criticized that approach, *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690, and other courts of appeals have refused to follow it.[14]

The magistrate was constrained by *Rabidue* in analyzing the effects of Hardy's conduct in the workplace. For

[14] The Third Circuit stated in *Andrews* v. *City of Philadelphia*, 895 F.2d 1469 (1990), that "pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment," as might "the posting of pornographic pictures in common areas and in the plaintiffs' personal work spaces." *Id.* at 1485. "Obscene language and pornography quite possibly could be regarded as 'highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse.'" *Id.* at 1485-1486, quoting *Bennett* v. *Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989). Similarly, the Fourth Circuit concluded in *Katz* v. *Dole*, 709 F.2d 251 (1983), that a female plaintiff who was exposed to a workplace "pervaded with sexual slur, insult and innuendo" and was "personally the object of verbal sexual harassment" that "took the form of extremely vulgar and offensive sexually related epithets addressed to and employed about" her, had adequately established the existence of a hostile work environment. *Id.* at 254, 256. See also *Ways* v. *City of Lincoln*, 871 F.2d 750, 753-755 (8th Cir. 1989) (evidence of racially offensive slurs, jokes, comments, and cartoons occurring on an ongoing basis was sufficient to establish a hostile work environment under Title VII); *Barbetta* v. *Chemlawn Services Corp.*, 669 F. Supp. 569, 572-573 (W.D.N.Y. 1987) (allegations of pornographic magazines in workplace, vulgar comments by co-workers and supervisors, requirement that female employees wear skirts or dresses on certain occasions because visiting supervisor liked to look at legs, and unwanted physical contact of a sexual nature by male employee were adequate to state claim for hostile environment sexual harassment; proliferation of pornographic material in workplace "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal co-workers").

example, the magistrate apparently reasoned, from his finding that Hardy's conduct would not affect petitioner's psychological well-being," that the conduct would not interfere with a reasonable woman manager's work performance:

> I believe that some of Hardy's inappropriate sexual comments, especially this last one [suggesting that petitioner promised sexual favors to a customer to secure an account] offended [petitioner], and would offend the reasonable woman. However, I do not believe they were so severe as to be expected to seriously affect [petitioner's] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

Pet. App. A33-A34. The magistrate's conclusion does not necessarily follow. A sexually demeaning work environment can interfere with a reasonable woman manager's work performance—regardless of psychological injury—if the environment hampers her opportunity to succeed vis-à-vis her male peers or denies her credit for her achievements. Sexually offensive conduct—such as Hardy's suggestion in the presence of other Forklift Systems employees that petitioner promised a customer "some 'bugger'" to secure an account, Pet. App. A17—can have both effects by degrading the manager in the eyes of her subordinates and by denying her credit for accomplishments achieved through superior effort or skill.

2. The magistrate concluded that petitioner's allegations presented a "close case" even under the *Rabidue* standard. See Pet. App. A31. Accordingly, Hardy's conduct should be reconsidered in light of the correct legal standard. The focus on remand should be on whether the offensive conduct was sufficiently pervasive to create an abusive environment that would interfere with the job performance of a reasonable employee subjected to that abuse.

The EEOC has explained that a hostile environment claim "generally requires a showing of a pattern of offensive conduct." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690; see also *Andrews* v. *City of Philadelphia*, 895 F.2d at 1484 ("[h]arassment is pervasive when 'incidents of harassment occur either in concert or with regularity,'" quoting *Lopez* v. *S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987)). The frequency or regularity of the conduct may counterbalance its lack of severity. See, *e.g.*, *Ellison*, 924 F.2d at 878 ("the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct"); see also *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6690 ("the more severe the harassment, the less need to show a repetitive series of incidents").

The EEOC has also explained that the pervasiveness of the harassment must be determined "in light of 'the record as a whole' and 'the totality of [the] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" See *Vinson*, 477 U.S. at 69, quoting 29 C.F.R. 1604.11(b). "Under the totality of the circumstances analysis, the district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode." *Burns* v. *McGregor Electronic Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992). Each separate incident of harassment need not "be sufficiently severe to detrimentally affect a female employee," because it is the "overall scenario" rather than "individual incidents" that determines the existence of a hostile work environment. *Andrews*, 895 F.2d at 1484-1485.

The question whether sexual harassment is "pervasive" should be analyzed from the objective perspective of a reasonable person subject to the offensive conduct. In a society that values freedom of expression and diversity of thought, a reasonable person's job performance is not impaired by isolated remarks or trivial incidents. But when

discriminatory conduct is sufficiently pervasive or severe to deprive the reasonable person of equal employment opportunity, Title VII is implicated. The inquiry necessarily turns on an objective analysis of the facts of the particular case. The fact that a plaintiff's work performance subjectively suffered is not sufficient by itself to establish pervasive harassment. But the fact that a plaintiff's co-workers do not find the environment hostile is also not controlling, particularly where the co-workers have been "conditioned to accept denigrating treatment." Pet. App. A32.

3. The magistrate's determination that petitioner was unable to establish constructive discharge may also need to be reexamined on remand. The magistrate predicated his rejection of petitioner's constructive discharge claim on his conclusion that she had not shown hostile environment sexual harassment. Pet. App. A37-A38. If it is determined on remand that petitioner has demonstrated actionable sexual harassment, it will be necessary to reexamine whether the conditions at Forklift Systems were so intolerable that they "foreseeably would compel a reasonable employee to quit." *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6693.[13]

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[13] The EEOC considers the absence of "an effective internal grievance procedure" in the workplace to be an "important factor" in evaluating claims of constructive discharge resulting from sexual harassment. *EEOC Guidance*, 8 F.E.P. Manual (BNA) at 405:6693. Forklift Systems presented no evidence of an internal grievance procedure to address claims of sexual harassment. Petitioner complained to Hardy about his offensive behavior and threatened to resign, indicating that she found his conduct intolerable, and she decided to remain at Forklift Systems only when Hardy promised to stop the harassment. Pet. App. A16. When Hardy soon resumed his conduct with a "truly gross and offensive" remark, *id.* at A33, petitioner may reasonably have believed that she had no choice but to put up with the conduct or to leave Forklift Systems.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

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